

1 John P. Aldrich, Esq. (Resident Counsel)
 2 Nevada State Bar #6877
 3 Aldrich Law Firm, Ltd.
 4 7866 West Sahara Ave.
 5 Las Vegas, NV 89117
 6 Tel: (702) 853-5490
 7 jaldrich@johnaldrichlawfirm.com

8
 9 *Liaison Counsel for [Proposed]*
 10 *Lead Plaintiff Carlos Marina*

11 Reed R. Kathrein (to be admitted *pro hac vice*)
 12 Lucas E. Gilmore (to be admitted *pro hac vice*)
 13 HAGENS BERMAN SOBOL SHAPIRO LLP
 14 715 Hearst Avenue, Suite 202
 15 Berkeley, CA 94710
 16 Telephone: (510) 725-3000
 17 Facsimile: (510) 725-3001
 18 reed@hbsslaw.com
 19 lucasg@hbsslaw.com

20
 21 *Attorneys for [Proposed]*
 22 *Lead Plaintiff Carlos Marina*

23 [Additional counsel on signature page]

24
 25
 26
 27
 28 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

15 TAD SCHLATRE, Individually and On
 16 Behalf Of All Others Similarly Situated,

17 Plaintiff,

18 v.

19
 20 MARATHON DIGITAL HOLDINGS, INC.,
 21 f/k/a MARATHON PATENT GROUP, INC.,
 22 MERRICK D. OKAMOTO, FREDERICK G.
 23 THIEL, and SIMEON SALZMAN,

24 Defendants.

25 Case No.: 2:21-cv-02209-RFB-NJK

26 **CLASS ACTION**

27 **CARLOS MARINA'S REPLY IN**
SUPPORT OF HIS MOTION FOR
APPOINTMENT AS LEAD
PLAINTIFF AND APPROVAL OF
SELECTION OF LEAD COUNSEL
 28 ORAL ARGUMENT REQUESTED

1 Carlos Marina respectfully submits this memorandum of law in further support of
 2 his motion for appointment as Lead Plaintiff (ECF No. 12) and in reply to the competing
 3 response of movants Wiedel and Venasithamby (ECF Nos. 16 and 18).¹

4 **A. Venasithamby is Atypical As He Purchased A Substantial Portion of His
 5 Shares After the Alleged Corrective Disclosure, Thereby Subjecting
 6 Venasithamby to the Same Unique Reliance Defenses Applicable to Wiedel.**

7 All remaining movants (Marina, Dana and Venasithamby) agree Wiedel cannot be
 8 appointed lead plaintiff of the class, since all of his shares and claimed losses stem from
 9 purchases made on November 15, 2021, after Defendants' misrepresentation and omissions
 10 were revealed to the market (i.e., Marathon's disclosure that the Company "and certain of
 11 its executives received a subpoena to produce documents and communications concerning
 12 the Hardin, Montana data center facility," and that the SEC "may be investigating whether
 13 or not there may have been any violations of the federal securities law.") Based on these
 14 post-disclosure purchases, all remaining movants concur that Wiedel may have no financial
 15 interest in the case, and at a minimum, is subject to unique reliance defenses rendering him
 16 atypical and inadequate to lead the class. *See* ECF Nos. 17, 18 and 19, *citing In re Hebron*
 17 *Tech. Co., Ltd. Sec. Litig.*, 2020 WL 5548856, at *8 (S.D.N.Y. Sept. 16, 2020). Ironically,
 18 Venasithamby neglects to point out that nearly half of his purchases of Marathon shares for
 19 which he claims losses also occurred on November 15, 2021 *after* the disclosure of the
 20 pending SEC investigation. *See* ECF No. 14-3 and 14-4. Indeed, out of the total of 1800
 21 shares purchased, 800 were after the alleged corrective disclosure on November 15, or
 22 44.4%. Thus, for the same reasons applicable to Wiedel, Venasithamby's claimed financial
 23 interest is similarly inflated, and at a minimum, Venasithamby is atypical as his substantial
 24 post-disclosure purchases present unique reliance defenses to his claims.

25
 26
 27 ¹ Movant Schlatre has filed a non-opposition to all competing movants (ECF No. 15).
 28 Movant Dana filed a response opposing Wiedel, but not opposing Mr. Marina, recognizing
 Mr. Marina's larger financial interest in the relief sought by the class. (ECF No. 17).

1 **B. Mr. Marina is the Presumptive Lead Plaintiff**

2 With Mr. Wiedel, Venasithamby and Schlatre removed from consideration, Mr.
 3 Marina indisputably satisfies the PSLRA's largest financial interest. As an initial matter,
 4 with losses of approximately \$264,421.41² in connection with his Class Period purchases of
 5 Marathon securities, Mr. Marina suffered the largest losses of the remaining competing
 6 movants:

Movant	Claimed Losses
Cory Jay Wiedel	\$494,650.28
Carlos Marina	\$264,421.41
Evan Dana	\$184,571.98
Pathma Venasithamby	\$57,433.96
Tad Schlatre	\$38,529.00

13 In addition to possessing the largest financial interest of the remaining movants,
 14 Mr. Marina (as demonstrated in his opening brief and accompanying declaration, *see* ECF
 15 Nos. 12 & 12-6) readily meets the applicable adequacy and typicality requirements under
 16 Rule 23.

17 During this second step, “all that is required is a ‘preliminary showing’ that the lead
 18 plaintiff group will satisfy the ‘typicality’ and ‘adequacy’ requirements” of Rule 23.
 19 *Erikson v. Cornerstone Propane Partners LP*, 2003 WL 22232387, *3 (N.D. Cal. Sept. 15,
 20 2003); see *Puente v. Chinacast Educ. Corp.*, 2012 WL 3731822, *3 (C.D. Cal. Aug. 22,
 21 2012) (same). Here, no one disputes that Mr. Marina’s claims are “co-extensive” with the
 22 class and thus satisfies the typicality requirement of Rule 23(a). *See Hanlon v. Chrysler*
 23 *Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled in part on other grounds by Wal-*
 24 *Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011) (“representative claims are
 25 ‘typical’ if they are reasonably co-extensive with those of absent class members”).

28

² As explained below, Mr. Marina has corrected his claimed loss amount.

1 Mr. Marina has also satisfied Rule 23's adequacy requirement. The Ninth Circuit
 2 uses a two-prong test to determine whether the representative parties meet this standard:
 3 “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class
 4 members and (2) will the named plaintiffs and their counsel prosecute the action vigorously
 5 on behalf of the class?” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011)
 6 (internal quotation marks omitted); 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(bb) (lead plaintiff
 7 lacks adequacy if he is “subject to unique defenses”).

8 There is no evidence of conflicts between Mr. Marina and other class members.
 9 Further, as explained above, Mr. Marina has a significant stake in the outcome of the instant
 10 action such that it is likely that he will vigorously prosecute the claims. *See, e.g., Miami*
 11 *Police Relief & Pension Fund v. Fusion-io, Inc.*, 2014 WL 2604991, *5 (N.D. Cal. June 10,
 12 2014) (appointing lead plaintiff in a securities class action where there was no evidence of
 13 conflicts and the presumptive lead plaintiff had a large stake in the litigation). Mr. Marina
 14 submitted a sworn certification, stating that he is “willing to serve as a representative party
 15 on behalf of the class” in this action, ECF No. 12-7; (*see also* Ex. A to the Reply
 16 Declaration of John P. Aldrich filed herewith, Marina Amended Certification); and a sworn
 17 declaration stating that he is informed of and understands the requirements and duties
 18 imposed by the PSLRA and his willingness to undertake those responsibilities. ECF No.
 19 12-6. Also, Mr. Marina has hired counsel with experience in the prosecution of securities
 20 class actions (*See* ECF No. 12-3 Firm Resume of Hagens Berman Sobol Shapiro) and an
 21 experienced, well-qualified local firm as liaison counsel (*See* ECF No. 12-4 Firm Resume
 22 of Aldrich Law Firm, Ltd.); *Philips v. Ford Motor Co.*, 2016 WL 7428810, *12 (N.D. Cal.
 23 Dec. 22, 2016) (finding adequacy at class action certification partly because “Plaintiffs’
 24 counsel has experience in prosecuting consumer protection actions involving claims similar
 25 to those in the instant case.”).

1 **C. The Competing Movants Have No Evidence Rebutting the Presumption in**
 2 **Favor of Mr. Marina**

3 Regardless, Venasithamby, who is fourth in line with claimed losses of only
 4 \$57,433.96³, and as noted above is atypical by his own admission, argues that typos and
 5 immaterial mistakes in the transcription of dates and missed 00s by Mr. Marina (as well as
 6 the next largest movant, Dana) are “proof” that Mr. Marina is inadequate. Mr. Marina
 7 respectfully submits that such innocent errors (as are corrected herein) are not “proof” that
 8 Mr. Marina will not “fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
 9 23(a)(4).

10 The first supposed “proof” of Mr. Marina’s inadequacy is an error made by a excel
 11 auto correcting last year (2021) with this year (2022). Thus, some dates in 2021 became
 12 2022 in the attachment to Mr. Marina’s certification --- a fact all too evident for opposing
 13 counsel to see, and not misleading. As this is still early in the year, it is easy to miss such an
 14 auto correction and was a clerical error that missed the eyes of attorneys and, unfortunately,
 15 Mr. Marina as well. The error has been corrected in the attached amended certification. *See*
 16 Reply Declaration of John P. Aldrich, Ex. A.

17 The second supposed “proof” of inadequacy is another clerical error where in Mr.
 18 Marina’s loss chart, Mr. Marina’s representatives simply forgot to multiply (in the formula)
 19 option shares by 100 – an arcane way options are reported and need to be converted. While
 20 this error was also missed by counsel in the spreadsheet formula, it does not materially
 21 reduce Mr. Marina’s damages since his losses are still larger than the claimed losses of
 22 Dana and Venasithamby. *See* Reply Declaration of John P. Aldrich, Ex. B. Neither Wiedel,
 23 Dana nor Venasithamby claim otherwise. Mr. Marina’s losses are still **\$264,421.41**.

24 Venasithamby chiefly argues that that these mistakes render Mr. Marina’s
 25 certification defective. But as noted recently in *Blake v. Canoo Inc.*, 2022 WL 599504, at
 26 *5 (C.D. Cal. Feb. 18, 2022), it is not necessarily a statutory requirement that a certification

27

 28 ³ Even these losses are disputable given that nearly 45% are attributed to shares likely
 purchased after the disclosure on November 15, 2021.

1 be filed in the first instance. *Citing 7 Newberg on Class Actions* § 22:49 at 335-36 (5th ed.
 2 2017) (“There is no doubt that a putative class representative *filling a complaint* must
 3 comply with this certification requirement. However, it is sometimes the case that plaintiffs
 4 ‘seeking to serve as a representative party on behalf of a class’ have not filed complaints. . .
 5 . It is less immediately obvious that such movants must file this certification in conjunction
 6 with their application to serve in those positions.”) (emphasis in original); *Aronson v.*
 7 *McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1155 (N.D. Cal. 1999) (noting that “[i]t seems
 8 strained to recast the words ‘filed with the complaint’ to mean ‘filed with the complaint or
 9 motion’”); *Andrade v. Am. Apparel, Inc.*, 2011 WL 13130706, *12 (C.D. Cal. Mar. 15,
 10 2011) (“[S]ince it is unsettled whether a candidate for lead plaintiff who has not filed a
 11 complaint is even required to submit [] a certificate, at this stage of the litigation, the
 12 adequacy of the certificate should not be the determinative factor in selecting the lead
 13 plaintiff”) (quoting *Bhojwani v. Pistiolis*, 2007 WL 2197836, *8 (S.D.N.Y. July 31, 2007)
 14 (brackets in original)).

15 Nevertheless, Mr. Marina has now corrected and amended his certification and loss
 16 calculations. *See* Reply Declaration of John P. Aldrich, Exs. A and. B. Courts do consider
 17 amended certifications when competing movants challenge alleged defects in the original
 18 certification. *See, e.g., Tai Jan Bao v. SolarCity Corp.*, 2014 WL 3945879, *4 (N.D. Cal.
 19 Aug. 11, 2014) (finding that despite “errors in [movant’s] sworn certification” and
 20 inaccuracies in his loss calculations, movant’s “amended certification [was] sufficient to
 21 make a *prima facie* showing of typicality and adequacy, which is all that is required for [the
 22 movant] to be anointed the presumptively most adequate plaintiff”); *In re Silver Wheaton*
 23 *Corp. Sec. Litig.*, 2017 WL 2039171, *10 (C.D. Cal. May 11, 2017) (finding that “the
 24 plaintiffs have offered reasonable explanations for what amount to clerical errors in their
 25 prior certifications.”); *In re Lyft Sec. Litig.*, 2020 WL 1043628, *6 (N.D. Cal. Mar. 4, 2020)
 26 (accepting a movant’s amended certification that “identify[d] each of the sales that [a
 27 competing movant] argue[d] were not included” in the initial certification). *Canoo* *6
 28 (same).

1 These are chiefly mistakes of counsel, and yes, we are embarrassed. But there is no
 2 “proof” undermining Mr. Marina’s typicality and adequacy. Accordingly, Mr. Marina
 3 should be appointed as Lead Plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II) (requiring
 4 “proof” to rebut presumption); *In re Cavanaugh*, 306 F.3d 726, 741 (9th Cir. 2002) (“[B]y
 5 statute, the presumption of most adequate plaintiff may be overcome only upon proof that
 6 the presumptively most adequate plaintiff ‘will not fairly and adequately protect the
 7 interests of the class’ or ‘is subject to unique defenses that render such plaintiff incapable of
 8 adequately representing the class.’”).

9 Given that Mr. Marina has satisfied all the PSLRA’s requirements for appointment
 10 as Lead Plaintiff, and each of the remaining movants assert a smaller financial interest, *see*
 11 *supra*, the Court need not consider the remaining competing motions. *Cavanaugh*, 306 F.3d
 12 at 741.

13 For the reasons stated herein, Movant respectfully requests that the Court: (1)
 14 appoint him as Lead Plaintiff; and (2) approve his selection of Hagens Berman (who will
 15 endeavor not to make these mistakes again) as Lead Counsel and the Aldrich Law Firm,
 16 Ltd. as Liaison Counsel.

17 DATED: March 8, 2022

18 ALDRICH LAW FIRM, LTD

19 By /s/ John P. Aldrich
 20 John P. Aldrich, Esq.
 21 NV Bar No. 6877
 22 7866 West Sahara Ave.
 23 Las Vegas NV 89117
 24 Tel. 702.853.5490
 25 Fax. 702.227.1975
 26 Email: jaldrich@johnaldrichlawfirm.com

27 *Liaison Counsel for [Proposed] Lead Plaintiff*
 28 *Carlos Marina*

29 Reed R. Kathrein (to be admitted *pro hac vice*)
 30 Lucas E. Gilmore (to be admitted *pro hac vice*)
 31 HAGENS BERMAN SOBOL SHAPIRO LLP
 32 715 Hearst Avenue, Suite 202
 33 Berkeley, CA 94710
 34 Telephone: (510) 725-3000
 35 Facsimile: (510) 725-3001

36 REPLY ISO MOTION TO APPOINT LEAD PL. AND LEAD
 37 COUNSEL

38 Case No. 2:21-cv-02209-RFB-NJK
 39 011074-11/1813720 V1

1 reed@hbsslaw.com
2 lucasg@hbsslaw.com

3 Steve W. Berman (to be admitted *pro hac vice*)
4 HAGENS BERMAN SOBOL SHAPIRO LLP
5 1301 Second Avenue, Suite 2000
6 Seattle, WA 98101
7 Telephone: (206) 623-7292
8 Facsimile: (206) 623-0594
9 steve@hbsslaw.com

10 *Attorneys for [Proposed] Lead Plaintiff*
11 *Carlos Marina and [Proposed] Lead Counsel*

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2022, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the email addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

ALDRICH LAW FIRM, LTD.

/s/John P. Aldrich

John P. Aldrich, Esq.